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First Amendment Scholars and Legal Organizations

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 IMDB.COM, INC., a Delaware) Case No. 3:16-cv-06535-VC
corporation,)
17 Plaintiffs,) **BRIEF OF AMICI CURIAE FIRST**
18 vs.) **AMENDMENT SCHOLARS AND**
19 KAMALA HARRIS, in her official) **LEGAL ORGANIZATIONS IN**
capacity as Attorney General of the State of) **SUPPORT OF PLAINTIFF IMDB.COM,**
California,) **INC.'S MOTION FOR PRELIMINARY**
20) **INJUNCTION**
21 Defendant.)
22) Judge: Hon. Vince Chhabria
23)
24) Date: February 16, 2017
25) Time: 10:00 a.m.
26) Location: Courtroom 4 – 17th Floor
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1 **CONSTITUTION**

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INTEREST OF *AMICI CURIAE*

On January 4, 2017, this Court entered an order permitting the filing of amicus briefs in support of IMDb's motion for preliminary injunction. (Dkt. No. 15.)

The *amici curiae* First Amendment Scholars include:

- Enrique Armijo, Associate Professor of Law, Elon University School of Law.
- Jane Bambauer, Associate Professor of Law, University of Arizona College of Law.
- Erwin Chemerinsky, founding Dean and Distinguished Professor of Law and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.
- Lyrissa Lidsky, Stephen C. O'Connell Professor, University of Florida, Levin College of Law.
- David Olson, Associate Professor of Law, Boston College Law School.
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- Eugene Volokh, Gary Schwartz Professor of Law, UCLA School of Law.

These scholars are all dedicated to the study of the freedoms guaranteed by the First Amendment and have published articles on this subject. Based on this experience, the *amici curiae* are concerned that the legislation at issue—and others like it that may be later enacted—imperil the protection of truthful speech under the First Amendment. The First Amendment Scholars seek to help the Court understand why California Assembly Bill 1687 is unconstitutional.

The *amici curiae* First Amendment Legal Organizations include the First Amendment Lawyers Association (FALA) and the Reporters Committee for Freedom of the Press.

1 FALA is a not-for-profit organization comprised of about 200 attorneys across the
 2 United States, Canada, and elsewhere who routinely represent businesses and individuals
 3 engaged in free expression protected by the First Amendment. FALA has a tradition of
 4 submitting amicus briefs in cases where First Amendment speech rights are endangered.

5 The Reporters Committee for Freedom of the Press is a voluntary, unincorporated
 6 association of reporters and editors that works to defend the First Amendment rights and
 7 freedom of information interests of the news media. The Reporters Committee has provided
 8 assistance and research in First Amendment and Freedom of Information Act litigation since
 9 1970. Like IMDb, the Reporters Committee has an interest in ensuring that truthful information
 10 is not suppressed in violation of the free speech clause of the First Amendment.

11 **ARGUMENT**

12 California Assembly Bill 1687 (“AB 1687”) violates the free speech clause of the First
 13 Amendment by prohibiting IMDb’s public site from reporting truthful information about the age
 14 of entertainment professionals. It purports to target discrimination, but fails to do so. Age
 15 information is readily available from alternative sources, including public records.

16 More importantly, even if AB 1687 effectively targeted discrimination, the Supreme
 17 Court has repeatedly held that it is unconstitutional to suppress the reporting of truthful
 18 information already in the public record. The proper remedy is not to suppress speech, but rather
 19 to enforce laws against age discrimination. Unless AB 1687 is struck down, there will be
 20 virtually no limit to the government’s ability to suppress the reporting of truthful facts by other
 21 sources, including the print media. The Court should grant IMDb’s motion for preliminary
 22 injunction.

23 **I. AB 1687 violates the free speech clause of the First Amendment.**

24 The First Amendment states: “Congress shall make no law . . . abridging the freedom of
 25 speech, or of the press” U.S. Const. amend. I. Laws such as AB 1687, which prohibit the
 26 publication of truthful information, strike at the core of the First Amendment.

1 **A. The Supreme Court has repeatedly held that it is unconstitutional to prohibit**
 2 **the publication of truthful information already in the public record.**

3 The Supreme Court has consistently held that it is unconstitutional to impose liability for
 4 reporting truthful information that is already in the public record. *See* Erwin Chemerinsky,
 5 CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1111 (5th ed. 2015). As the California
 6 Legislature acknowledged when it passed AB 1687, age information is readily available from
 7 public sources such as birth records. *See* Cal. Health & Safety Code § 103526.¹

8 The first Supreme Court decision to delve into this issue was *Cox Broadcasting Corp. v.*
 9 *Cohn*, 420 U.S. 469 (1975). In *Cox*, the Supreme Court held that the First Amendment protected
 10 a media defendant from liability for reporting the name of a rape victim lawfully obtained from
 11 public court documents. *Id.* at 496-97. The court observed that “interests in privacy fade when
 12 the information involved already appears on the public record.” *Id.* at 494-95.

13 Two years later, the Court reaffirmed this principle in *Oklahoma Publishing Co. v.*
 14 *District Court in and for Oklahoma County*, 430 U.S. 308 (1977) (per curiam). There, it
 15 concluded that the First Amendment protected a reporter’s rights to publish a juvenile
 16 defendant’s name and photograph lawfully obtained in a public courtroom proceeding. *Id.* at
 17 308-12. The Court “held that once the truthful information was ‘publicly revealed’ or ‘in the
 18 public domain’ the court could not constitutionally restrain its dissemination.” *Smith v. Daily*
 19 *Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (quoting *Oklahoma Publ’g Co.*, 430 U.S. at 311-12).

20 Although each of the Court’s decisions was fact specific, the import of its jurisprudence
 21 was unmistakable. As the Court itself declared: “Our recent decisions demonstrate that state
 22 action to punish the publication of truthful information seldom can satisfy constitutional
 23 standards.” *Daily Mail Publ’g Co.*, 443 U.S. at 102. In *Daily Mail*, the Court again held, in line
 24 with its previous decisions, that a statute which made it a crime for a newspaper to publish the
 25 name of any youth charged as a juvenile offender violated the First Amendment and could not

26 ¹ Assembly Floor Analysis, Third Reading, AB 1687, at 2 (Cal. May 6, 2016), *available at*
 27 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1687;
 28 Assembly Comm. on Privacy & Consumer Prot., AB 1687, at 4 (Cal. Apr. 29, 2016) (same URL)
 (last visited Jan. 12, 2017).

1 be justified even if it protected juveniles. *Id.* at 102-06; *see also Landmark Commc’ns, Inc. v.*

2 *Virginia*, 435 U.S. 829, 830-31, 834-42 (1978) (holding unconstitutional a statute that forbade

3 the news media from disclosing truthful information regarding ethical investigations of judges,

4 even though confidentiality served legitimate state interests).

5 A decade later, the Court again found it necessary to curb the government’s attempt to

6 suppress truthful facts in the public record. *See Florida Star v. B.J.F.*, 491 U.S. 524, 526, 541

7 (1989). In *Florida Star*, the Court held that the First Amendment protected a newspaper from

8 liability for reporting the name of a rape victim it obtained from a publicly released police

9 report, even if suppression of such information served the laudable purpose of protecting the

10 privacy and safety of rape victims. *Id.* at 526, 541. It observed that punishing third-parties for

11 “dissemination of information which is already publicly available is relatively unlikely to

12 advance the interests in the service of which the State seeks to act.” *Id.* at 535.

13 Here, as in the foregoing cases, California is attempting to limit the dissemination of

14 truthful age information that is already in the public record. This Court should follow the

15 numerous Supreme Court decisions that have struck down such laws as unconstitutional.

16 **B. AB 1687 will not prevent age discrimination, but even if it did, it is**

17 **unconstitutional to suppress truthful information in pursuit of this goal.**

18 The stated purpose of AB 1687 is to prevent “employment or age discrimination.” AB

19 1687(a). But AB 1687 does not prevent discrimination because entertainment professionals’

20 ages are available from many alternate sources, such as public records, newspapers, magazines,

21 and other public websites.² Even if it did, the ends do not justify the means.

22 “The normal method of deterring unlawful conduct is to punish the person engaging in

23 it.” *Barnicki v. Vopper*, 532 U.S. 514, 516 (2001). As the Supreme Court has noted: “It would

24 be remarkable to hold that speech by a law-abiding possessor of information can be suppressed

25 _____

26 ² For example, when “what is the birthday of Julia Roberts” is typed into a Google search, many

27 well-known sources such as Wikipedia, People, E! News Online, Biography.com, InStyle, and

28 Parade report her age. Even the age of lesser known actors is easily available online. For

example, when “how old is Hannah John-Kamen” (who played one of many “First Order

Officers” in *StarWars: The Force Awakens*) is put into a Google search, six sources report her

birthdate or age on the first search results page. (Searches run Jan. 8, 2017.)

1 in order to deter conduct by a non-law-abiding third party.” *Id.* Yet, that is exactly what the
 2 California legislature proposes to do here by suppressing IMDb’s right to publish truthful
 3 information in order to prevent age discrimination in the entertainment industry.

4 The facts of *Bartnicki* presented a far more compelling case for the suppression of third-
 5 party speech than the facts of this case. In *Bartnicki*, a media defendant published the contents
 6 of an illegally intercepted, private communication. *Id.* at 517. Even so, the Supreme Court
 7 concluded that the government’s interest in discouraging parties from intercepting private
 8 conversations could not overcome the media’s First Amendment rights. *Id.* IMDb’s behavior is
 9 innocuous by comparison. It is doing nothing more than publishing age information that is
 10 already public. The government cannot justify such an incursion into core free speech rights
 11 simply because publishing an actor’s age might lead to discrimination.

12 As the Supreme Court aptly summed it up: “Those who seek to censor or burden free
 13 expression often assert that disfavored speech has adverse effects.” *Sorrell v. IMS Health Inc.*,
 14 564 U.S. 552, 577 (2011). “But ‘the fear that people would make bad decisions if given truthful
 15 information’ cannot justify content-based burdens on speech.” *Id.* (citation omitted).

16 **C. AB 1687 does not fall within the narrow categories of unprotected or less
 17 protected speech.**

18 There are limited categories of content-based speech, such as incitement of illegal
 19 activity and commercial speech, that “are unprotected or less protected by the First Amendment.”
 20 Chemerinsky, CONSTITUTIONAL LAW at 977, 1036-37 (citing *United States v. Stevens*, 558 U.S.
 21 460, 468-69 (2010)). AB 1687 falls far outside these narrow bounds.

22 IMDb publishes truthful information regarding the age of professionals in the
 23 entertainment industry. It is by no means advocating age or employment discrimination.
 24 Nonetheless, a brief discussion of the Supreme Court’s jurisprudence concerning incitement of
 25 illegal activity shows just how far afield of the First Amendment the California Legislature has
 26 gone in this case. As Justice Brandeis stated, “even advocacy of [law] violation, however
 27 reprehensible morally, is not a justification for denying free speech where the advocacy falls

1 short of incitement and there is nothing to indicate that the advocacy would be immediately
 2 acted on.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

3 The Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) illustrates
 4 the protections provided even to speech that expressly advocates violation of the law. There,
 5 news footage of a Ku Klux Klan meeting captured the appellant giving a speech in Klan regalia,
 6 stating: “We’re not a revengent organization, but if our President, our Congress, our Supreme
 7 Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be
 8 some revengeance taken.” *Id.* at 446. The Court overturned the appellant’s conviction under an
 9 Ohio statute making it unlawful to advocate violence. It held that “the constitutional guarantees
 10 of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of
 11 force or of law violation except where such advocacy is directed to inciting or producing
 12 imminent lawless action and is likely to incite or produce such action.” *Id.* at 447.

13 The speech at issue in this case—publication of the ages of professionals in the
 14 entertainment industry—is far more innocuous than the constitutionally protected speech at
 15 issue in *Brandenburg*. It would be anomalous to suggest that advocating violence at a Klu Klux
 16 Klan rally is protected by the First Amendment but publishing an actor’s birthdate is not.

17 Nor can AB 1687 find a safe harbor under the reduced First Amendment protections for
 18 commercial speech. Typically, commercial speech (1) “does ‘no more than propose a
 19 commercial transaction,’” (2) makes “reference to a specific product,” and (3) is driven by an
 20 “economic motivation.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983)
 21 (citation omitted). Unlike IMDbPro, the profiles on IMDb’s public site are not paid for by
 22 subscribers. (Dkt. No. 16 at p. 3.) Rather, IMDb’s public site relies on non-paying users from
 23 around the world to submit content to create an encyclopedia of information regarding the
 24 entertainment industry (similar to Wikipedia). *Id.* Thus, the age information on IMDb’s public
 25 site does not propose a commercial transaction or reference a product and is not posted with an
 26 economic motivation. In short, IMDb’s publication of age information lacks all of the key
 27 characteristics of commercial speech.

Even if age information were deemed commercial speech, AB 1687 is still unconstitutional. Granted, “advertising of illegal activities is not protected by the First Amendment.” Chemerinsky, CONSTITUTIONAL LAW at 1154 (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973)). However, while employment discrimination is illegal, publishing age information is not. To illustrate the distinction, in *Pittsburgh Press*, a newspaper placed help-wanted advertisements under gender-designated columns (such as “Female Help Wanted”). 413 U.S. at 378-80. The Court held that an ordinance that prohibited aiding discriminatory advertising did not violate the First Amendment because “the commercial activity itself [wa]s illegal and the restriction on advertising [wa]s incidental to a valid limitation on economic activity.” *Id.* at 388-89. In contrast, IMDb does not itself post, or aid in posting, age discriminatory advertisements.

Where commercial speech is lawful and not misleading, regulation of such speech is only allowed if, among other things, it “directly advances a substantial governmental interest.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). The Supreme Court “has declined to uphold regulations that only indirectly advance the state interest involved.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). Again, AB 1687 does not prevent age discrimination because age information is available from other sources. *See supra* part I.B. Thus, even if AB 1687 targets commercial speech, it is unconstitutional.

D. AB 1687 jeopardizes the marketplace of ideas.

A “classic argument for protecting freedom of speech as a fundamental right is that it is essential for the discovery of truth.” Chemerinsky, CONSTITUTIONAL LAW at 1111. “Justice Oliver Wendell Holmes invoked the powerful metaphor of the ‘marketplace of ideas’ and wrote that ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.’” *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Suppressing truthful information jeopardizes the marketplace of ideas.

Limiting what is termed “crime-facilitating speech” is based on the theory that certain crimes cannot be committed without certain factual information. Eugene Volokh, *Crime-*

1 *Facilitating Speech*, 57 STAN. L. REV. 1095, 1096-1103, 1107 (2005). If you prevent a would-be
 2 criminal from acquiring the facts needed to commit a crime, then you prevent the crime. *Id.* at
 3 1103, 1107. For example, if you prevent would-be suicide bombers from acquiring instructions
 4 on how to make a bomb, you prevent suicide bombings. The premise of AB 1687 is that if you
 5 prevent casting directors from obtaining age information, then you prevent age discrimination.

6 However, most crime-facilitating speech has both valuable and harmful uses. *Id.* at 1105,
 7 1126-27. For example, although books about explosives can be misused by suicide bombers,
 8 they can also educate students on chemistry and engineering principles. *See id.* at 1112. Thus, the
 9 problem with banning crime-facilitating speech is that it prohibits both valuable uses and
 10 harmful ones. *See id.* at 1105, 1127. Even if there are some circumstances where the harmful
 11 nature of crime-facilitating speech outweighs its benefits, this is not such a case. The disclosure
 12 of the ages of entertainment professionals has many valuable uses, including entertaining,
 13 satisfying curiosity, and educating. *See id.* at 1111-26. Disclosure can even help make the public
 14 aware of age discrimination so that the public can advocate against such discrimination through
 15 their purchase decisions. *See id.* at 1115-21. For instance, when enacting AB 1687, the
 16 legislature expressed concern about the “practice of casting a much younger female against a
 17 much older male.”³ If the public does not know the ages of actors in movies, they cannot fight
 18 age discrimination by watching only movies in which the actors are similarly aged.

19 AB 1687 focuses on only the harmful use of age information, which purportedly is to
 20 discriminate against actors, and does not even fully serve that interest. A ““law cannot be
 21 regarded as protecting an interest of the highest order, and thus as justifying a restriction on
 22 truthful speech, when it leaves appreciable damage to that supposedly vital interest
 23 unprohibited.”” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (2015) (citation omitted).
 24 Again, forbidding IMDb’s public site from reporting age information will not prevent age
 25 discrimination because casting directors can easily find out the same age information from many
 26

27 ³ S. Floor Analyses, S. Rules Comm., AB 1687, at 3 (Cal. Aug. 3, 2016); S. Judiciary Comm.,
 28 AB 1687, at 2 (Cal. June 27, 2016), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1687 (last visited Jan. 12, 2017).

1 other sources. *See supra* part I.B. For AB 1687 to be wholly inclusive, it would have to forbid
 2 anyone and everyone from reporting entertainment professionals' age information to the public.
 3 And for AB 1687 to be effective, it would have to be wildly broad. For instance, reporting that
 4 an actress played a part in a 1976 film means she is at least 40 years old and could be categorized
 5 as "age information."

6 In fact, the constitutional concerns raised by AB 1687 are so compelling that a report
 7 from the Senate Judiciary Committee advised that the law "could impact the exercise of free
 8 speech on . . . news Web sites that profile figures in the entertainment industry." *See* S. Judiciary
 9 Comm., AB 1687, at 5-6 (Cal. June 27, 2016).⁴ It advised the Committee "to consider an
 10 amendment restricting the reach of this bill to only cover sensitive age information disclosed as
 11 part of the subscriber-service provider relationship." *Id.* Despite knowing that AB 1687 could
 12 limit free speech, the legislature disregarded that recommendation.

13 In sum, IMDb's public site should not be prohibited from providing facially innocuous
 14 and valuable information from the world, just because the information has the potential to be
 15 used wrongly by a few casting directors. To do so is unconstitutional.

16 **II. If AB 1687 is upheld, there will be virtually no limit on the government's ability to
 17 suppress the reporting of truthful facts by other sources.**

18 If AB 1687 is upheld, the California legislature could be given a blank check to enact
 19 other laws suppressing truthful information in the name of preventing unlawful conduct. Such
 20 laws could reach nearly any source of information, including the print media.

21 For example, the legislative history of AB 1687 shows that, in addition to age
 22 discrimination, the legislature was also concerned about sex discrimination against women.⁵ If
 23 the government can suppress age information in fear of age discrimination, then surely the
 24 government can suppress sex information in fear of sex discrimination. Under a law targeting

26 ⁴ Available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1687.

27 ⁵ See S. Floor Analyses, S. Rules Comm., AB 1687, at 3 (Cal. Aug. 3, 2016), available at
 28 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1687; S. Judiciary Comm., AB 1687, at 2 (Cal. June 27, 2016) (same URL) (last visited Jan. 12, 2017).

1 sex discrimination, IMDb's public site would be forced to remove all information that could
 2 possibly reveal the gender of entertainment professionals, including pronouns, pictures, and
 3 names if not gender-neutral. Likewise, race information, such as pictures, could be suppressed
 4 in fear of race discrimination. National origin information, such as which country someone is
 5 from, could be suppressed in fear of national origin discrimination. The list of facts that could
 6 be suppressed in the name of preventing discrimination is limitless.

7 Moreover, if it is constitutional for the government to suppress IMDb's public site from
 8 reporting age information, there will be virtually no limit to the government's ability to suppress
 9 the reporting of many other truthful facts by many other sources—from websites to magazines
 10 to newspapers to individual bloggers. Particularly in an age where the media is struggling to
 11 combat the pernicious effects of false news, the truth should not be suppressed.

12 CONCLUSION

13 Truthful facts, like many things, may be wrongly used by some. This does not mean the
 14 truth should be withheld from all. Allowing the government to prohibit IMDb's public site from
 15 reporting the age information of entertainment professionals in fear of age discrimination would
 16 be an unprecedented, unconstitutional act. Worse, it could lead to prohibitions on reporting
 17 many other truthful facts by many other sources. This case is not a close call. AB 1687 violates
 18 the free speech clause of the First Amendment. Accordingly, the Court should grant IMDb's
 19 motion for preliminary injunction.

20
 21 Dated: January 12, 2017

HAYNES AND BOONE, LLP

22
 23 By: /s/ Mary-Christine Sungaila

24
 25 Mary-Christine Sungaila
 Counsel for *Amici Curiae*
 First Amendment Scholars and
 Legal Organizations

PROOF OF SERVICE

I hereby certify that on January 12, 2017, I filed the forgoing **Brief of Amici Curiae** **First Amendment Scholars and Legal Organizations in Support of IMDb.com, Inc.’s Motion for Preliminary Injunction** with the Court through this district’s CM/ECF system.

Pursuant to Local Rule 5 – 3.3, the “Notice of Electronic Filing” automatically generated by the CM/ECF at the time the document is filed with the system constitutes automatic service of the document on counsel of record who have consented to electronic service.

Dated: January 12, 2017

By: /s/ Mary-Christine Sungaila
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